Filed 7/6/10 P. v. Denny CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SANDRA DALE DENNY,

Defendant and Appellant.

F058294

(Super. Ct. No. MCR029096B)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Eric C. Wyatt, Judge.

Alison E. Kaylor, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Kari L. Ricci, Deputy Attorneys General, for Plaintiff and Respondent.

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After the trial court found Sandra Dale Denny (appellant) had violated her probation, it revoked her probation and sentenced her to three years in state prison. Appellant appeals, contending that the court erred by admitting inadmissible hearsay

evidence at her probation revocation hearing and that the evidence does not support a finding that she failed to comply with the terms of her probation. In addition, as we explain in part 3 of DISCUSSION, we deem to be raised the contention that appellant is entitled to additional conduct credit. We find no error and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

On July 10, 2007, an officer responded to a suspected mail theft by two suspects in a white Chevy S-10 pickup truck.[1] The officer observed the vehicle and initiated a traffic stop. Appellant, who was the passenger in the pickup, claimed that she and her male companion found a bag of mail. A plastic bag on the passenger side of the vehicle next to appellant's purse contained several pieces of mail from various addresses. Additional pieces of opened mail, consisting of bills, checks, a Home Depot charge card, greeting cards, credit card offers, and financial statements, were discovered under the passenger seat. Appellant admitted to having a drug problem and said she had used methamphetamine earlier that day.

In August of 2007, appellant pled no contest to one count of possession of stolen property (Pen. Code, § 496, subd. (a)).[2] In October of 2007, the trial court suspended imposition of sentence and placed appellant on five years' felony probation. She was ordered to serve 90 days in county jail. The conditions of probation included a requirement that appellant submit to drug testing and not possess or use any illegal drugs.

Between December of 2007 and July of 2008, appellant incurred three violations of probation. In August of 2008, appellant admitted that she violated probation and possessed or used illegal drugs in December of 2007, and May and July of 2008. Probation was revoked and reinstated.

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[1]The facts of the offense are not at issue and are taken from the probation report dated October 4, 2007.

[2]All further statutory references are to the Penal Code unless otherwise stated.

In October of 2008, in a separate case, appellant pled no contest to one count of unlawfully using or being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)). The court then found that appellant had again violated the terms of her probation in the current case. The court sentenced appellant to an aggravated term of three years in state prison, suspended execution of sentence, and revoked and reinstated appellant's probation for a period of five years subject to additional terms and conditions.

In March of 2009, appellant admitted violating her probation by being in possession of drug paraphernalia and having a positive drug test. And in the middle of May of 2009, appellant again admitted violating her probation by failing to comply with the condition to not possess or use illegal drugs by testing positive and being in possession of a marijuana pipe. Following both admissions, the trial court revoked and reinstated appellant's probation for five years subject to additional terms and conditions.

At the end of May of 2009, the district attorney filed a petition for revocation of probation. Specifically, the petition alleged appellant violated the conditions that she enroll in and complete the New Life for Girls treatment program and that she not possess or use illegal drugs or drug paraphernalia.

In July of 2009, the trial court conducted a contested hearing. At the hearing, Probation Officer Flora Munoz testified that, on May 19, 2009, the day after appellant was released from jail on her fourth violation of probation, appellant told Munoz that she was going to fail the drug treatment program and that she only selected the program to avoid going to jail. When appellant asked Munoz what would happen if she left the program, Munoz reminded appellant that she had selected the program and should attempt to make the program work for her because to fail would be a violation of her probation. A urine sample provided by appellant twice tested positive for amphetamines.

Probation Officer Munoz also testified that she received correspondence from the New Life for Girls residential treatment program stating appellant voluntarily left the program. Munoz read to the court a letter from the program director:

> "'This letter is to inform Madera County Probation Department, [appellant] voluntarily left the New Life for Girls live-in residential drug rehabilitation program on Monday May 25, 2009, at approximately 10:30 a.m. [¶] When discussing with [appellant] the consequences of her leaving the program, she indicated she was … "Not tired yet," … of living the lifestyle she had become accustom to.'"

Munoz subsequently spoke to the program director, who confirmed that appellant voluntarily left the program, despite attempts to convince her to stay. The program director informed Munoz of appellant's statement that, "'She was not tired yet,'" and that the director terminated her from the program.

Appellant testified in her own defense. She claimed she took Sudafed the night after her release from jail, which caused her urine sample the following day to test positive for amphetamines. She denied taking any methamphetamine between the time she was released and her meeting with Munoz. Appellant also claimed she did not voluntarily leave the New Life for Girls treatment program and she never told Munoz that she did not want to attend the program. According to appellant, she was told to leave the program because she used a telephone in violation of program rules to call her mother for some ear drops, although she also claimed the phone call was sanctioned by someone who worked at the program.

Appellant's mother, Shirley Lawson, testified that appellant called her to ask for some ear drops. While she was on the phone, someone in the background told appellant she had to leave the program when appellant mentioned the Salvation Army. The other individual then got on the line with Lawson and said "'I didn't realize you were trying to get your daughter into the Salvation Army,'" and Lawson hung up.

Frank Day, a deputy probation officer, testified that ephedrine could cause a false positive result for methamphetamine in a urine sample. Officer Day believed that Sudafed contained ephedrine, and although he did not know the exact dosage that would cause a false positive result, he did opine that it would have to be in "extremely high dosages."

In rebuttal, Munoz testified that, when appellant's urine sample tested positive, appellant questioned the results, but did not mention having taken any other medications.

Following the contested hearing, the trial court found appellant in violation of probation, revoked probation, and sentenced her to three years in state prison.

DISCUSSION

1. Admission of Hearsay Evidence

Relying primarily on *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*) and *People v. Winson* (1981) 29 Cal.3d 711 (*Winson*), appellant argues she was deprived of her constitutional right to due process at the probation revocation hearing when the court admitted and considered the New Life for Girls treatment program director's letter through the probation officer, because it was inadmissible hearsay evidence. We disagree.

"The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." (*Black v. Romano* (1985) 471 U.S. 606, 610.)

> "The fundamental role and responsibility of the hearing judge in a revocation proceeding is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred and, if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348; see also *People v. McGavock* (1999) 69 Cal.App.4th 332, 337.)

Hearsay evidence may be used at probation revocation hearings if it bears a substantial degree of trustworthiness. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *People v. Maki* (1985) 39 Cal.3d 707, 715-717 (*Maki*).) The determination of trustworthiness rests within the discretion of the trial court. (*People v. Brown* (1989) 215 Cal.App.3d 452, 454-455.) "A trial court's decision to admit or exclude evidence in a probation revocation hearing will not be disturbed on appeal absent an abuse of discretion." (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197-1198 (*Shepherd*).)

In *Arreola*, *supra*, 7 Cal.4th at page 1150, the defendant objected on several grounds to the use of a preliminary hearing transcript at a probation revocation hearing. The defendant asserted hearsay and lack of foundation in that there had been no showing of the declarant's unavailability or other good cause. The trial court admitted the transcript without finding good cause. (*Id.* at p. 1151.) Reaffirming its holding in *Winson*, *supra*, 29 Cal.3d 711, *Arreola* concluded that the arresting officer's testimony at a preliminary hearing on new charges forming the basis for revocation of probation was inadmissible at the probation revocation hearing absent a showing of good cause or witness unavailability. (*Arreola*, *supra*, at pp. 1159-1161.) Moreover, the good cause showing must be considered together with other relevant circumstances, including the purpose for which the evidence is offered, the significance of the evidence to the factual determination upon which the alleged probation violation is based, and whether other admissible evidence corroborated the evidence in question. (*Id.* at p. 1160.)

In *Shepherd*, *supra*, 151 Cal.App.4th 1193, the court found *Arreola* and *Winson* controlling and concluded that the defendant's probation officer's testimony consisted of inadmissible hearsay. (*Shepherd*, *supra*, at pp. 1199-1203.) In *Shepherd*, the probation officer testified that he had spoken to a program administrator from the residential treatment program who told the probation officer that the defendant had been asked to leave the program after smelling of and testing positive for alcohol consumption. The program administrator did not testify at the hearing, and no other evidence supported the administrator's alleged out-of-court statements. Furthermore, it was not even clear from the probation officer's testimony whether the program administrator herself observed the defendant's alleged probation violation or whether she was reporting what she had been told by others at the program. (*Shepherd, supra*, at p. 1198.)

In *Maki, supra*, 39 Cal.3d 707 the court noted its qualification in *Winson* that the right of confrontation is "not absolute and where '"appropriate," witnesses may give evidence by document, affidavit or deposition [citations].' [Citation.]" (*Maki*, *supra*, at p. 710.) The court concluded that a car rental invoice, used to show the defendant failed

to obtain consent to leave the area, had sufficient indicia of reliability because it indisputably contained the defendant's signature, dispelling the dangers of hearsay evidence. The hotel receipt, although not signed, corroborated the car rental receipt. (*Id.* at pp. 714-717.)

The rationale for the different treatment of documentary evidence and former testimony was explained by our Supreme Court as follows:

> "There is an evident distinction between a transcript of former live testimony and the type of traditional 'documentary' evidence involved in *Maki* that does not have, as its source, live testimony. [Citation.] As we observed in *Winson*, the need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. [Citation.] Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Arreola*, *supra*, 7 Cal.4th at pp. 1156-1157.)

Finally, in *People v. O'Connell* (2003) 107 Cal.App.4th 1062 (*O'Connell*), the alleged inadmissible hearsay consisted of a single-page report from the program manager of a drug treatment program. The report stated that the defendant had been terminated from the program due to "Too Many Absences." The program manager added, "'This client completed 0 of 20 sessions.'" (*Id.* at p. 1066.) The court in *O'Connell* determined that the report was "akin to the documentary evidence that traditionally has been admissible at probation revocation proceedings" and "bore the requisite indicia of reliability and trustworthiness so as to be admissible." (*Id.* at pp. 1066-1067.) The court distinguished case law dealing with the use of former testimony, finding the report "was prepared contemporaneously to, and specifically for, the hearing where [the defendant's] lack of compliance with the deferred entry of judgment program was at issue." (*Id.* at p. 1067.)

Here, as in *Maki* and *O'Connell*, the letter from the New Life for Girls program director stating that appellant left the treatment program voluntarily "bore the requisite indicia of reliability and trustworthiness so as to be admissible." (*O'Connell*, *supra*, 107 Cal.App.4th at pp. 1066-1067.) Officer Munoz received the letter, dated the day after appellant left the program, and placed it in appellant's file. Munoz subsequently corroborated the information in the letter by speaking to the program director.

As for appellant's statement in the letter that she was "not tired" of her lifestyle, that quote was specifically struck by the trial court prior to its ruling:

> "THE COURT: … I want to make the record clear that based then upon all the testimony that was given, the quote 'Of not tired yet' [*sic*] that is in the letter that I had allowed in earlier, that is not a compelling quote. It's not something that is making any determination. It was allowed in by me earlier. If you want me to sustain it as to that quote, I would be happy to do that. But I can tell you that is not what is impacting that quote in and of itself alone in terms of the outcome that I am going to rule on. So if you want that sustained as to that quote, solely that's in that letter, which is where it was, I will do that. I'm sure at this point then having heard the argument, Defense, what's your position solely on that quote out of that letter?
>
> "[DEFENSE COUNSEL]: We would renew that objection, Your Honor.
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> "THE COURT: Okay. That portion only then is not considered."

Accordingly, we conclude that the trial court did not abuse its discretion in admitting the letter from the program director of the New Life for Girls treatment program into evidence. (*Shepherd*, *supra*, 151 Cal.App.4th at pp. 1197-1198.)

2. Sufficiency of the Evidence

Appellant also contends that the evidence before the trial court did not support the finding that she failed to comply with the terms of her probation by possessing or using illegal drugs. She argues that the only evidence tying her to drug use was a urine sample which was improperly administered. We disagree.

Section 1203.2, subdivision (a) provides in pertinent part: "[T]he court may revoke and terminate such probation if the interests of justice so require and the court, in

its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses."

The court has "reason to believe" that a defendant has violated a condition of probation sufficient to permit a court to revoke probation when it is proven by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.) This standard is consistent with the broad discretion accorded the trial court when determining whether to revoke probation.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether … there is substantial evidence, contradicted or uncontradicted, which will support the determination …." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) We review the evidence in the light most favorable to the respondent. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) "In making our determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) Nowhere are these principles more pertinent than in an appeal from a probation revocation hearing where the trial court is explicitly accorded very broad discretion by statute.

Here, the evidence that appellant violated the probation condition that she "not possess or use illegal drugs" consisted of a urine sample which twice tested positive for amphetamines. When confronted with the positive drug test, appellant did not inform Officer Munoz she had taken medications the night before the test.

Appellant argues that the evidence at the hearing indicated the positive drug test was suspect because she was ill and had been prescribed medications, supporting the inference that she may have taken medication prior to providing the urine sample. But what appellant asks us to do is precisely what the axioms of appellant review preclude.

The court was aware of the conflicts in the testimony, but concluded that, although appellant had "every opportunity to present the evidence" that the cold medicine could actually result in a false positive test result, "[s]imply having a possibility doesn't change the result as it was set forth."

There was sufficient evidence that appellant violated the terms of her probation by being in possession of or using illegal drugs. Appellant has failed to demonstrate that the trial court abused its discretion in revoking her probation. (*People v. Vanella* (1968) 265 Cal.App.2d 463, 469.)

3. Conduct Credit

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

The court sentenced appellant in August 2009, calculated appellant's conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we

would deem raised, without additional briefing, the contention that prospective-only application of the amendment is contrary to the intent of the Legislature and violates equal protection principles. We deem these contentions raised here.

Under section 3, it is presumed that a statute does not operate retroactively "'absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application]. [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) The Legislature neither expressly declared, nor does it appear by "'clear and compelling implication'" from any other factor(s), that it intended the amendment operate retroactively. (*Ibid*.) Therefore, the amendment applies prospectively only.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held that the amendatory statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the amendment to section 4019.

We conclude further that prospective-only application of the amendment does not violate appellant's equal protection rights. Because (1) the amendment evinces a legislative intent to increase the incentive for good conduct during presentence confinement, and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)

(The issue of whether the amendment applies retroactively is currently before the California Supreme Court in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, and *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.)

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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POOCHIGIAN, J.